

Anand

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 5631 OF 2023

Balkabai Vitthal Yadav (since deceased) .Petitioners
through legal heirs & ors.

Vs.

Rajaram Shiva Yadav (since deceased) .Respondents
through legal heirs & anr.

Mr. Sugandh B. Deshmukh a/w. Mr. Irvin D'Souza & Mr. Vaibhav
Thorve, Advocate, for the Petitioners

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 18.7.2023

P. C.

. The challenge in the Petition is to the order dated 11.03.2019 passed by learned 3rd Jt. C. J. S. D., Karad rejecting the Petitioners' application for amendment of the plaint.

2. Heard learned counsel for the Petitioners.

3. Learned counsel for the Petitioners submits that the suit was filed in the year 2009 seeking removal of encroachment on the basis of the registered sale deed, which has been executed in favour of the Petitioners in respect of 81R land of Gat No. 646. He would further contend that the cause of action for filing of the

suit arose when the Petitioners were dispossessed from 81R land of Gat No. 646 by the Respondents, who were the purchasers of the balance land of Gat No. 646. He would further submit that the amendment application came to be filed seeking relief of partition and separate possession, as the said Gat No. 646 was undivided land and the portion was unidentified.

4. Considered the submissions. The Petitioners have come with a specific case that pursuant to the registered sale deed, they were in possession of certain portion of land of Gat No. 646 from which they are dis-possessed. They claim their possession on the basis of title and simplicitor a suit was filed for removal of encroachment. In these proceedings, after the evidence of the Petitioners was recorded, an application has been filed for amendment for the purpose of seeking relief of partition and separate possession. Considering the stage of the trial, Order VI, Rule 17 of the Code of Civil Procedure came into play and there was nothing on record brought by the Petitioners to establish as to why inspite of due diligence, the matter could not have been raised before the commencement of the trial. A perusal of the application for amendment of the plaint dated 11.03.2019 does not indicate any explanation to that effect and

the only averment is that the same is necessary to adjudicate the proceedings. The position in law of amendment is that all amendments which are necessary for adjudication of the issues in controversy must be allowed. However, there are fetters on powers of the Court after the trial is commenced to allow amendment. That apart, the suit has been instituted in the year 2009 and by the proposed amendment, the Petitioners seek partition and separate possession of their shares in an application filed in the year 2019 and as such, the same is clearly barred by limitation. The Apex Court in various decisions have held that although it is not an absolute rule, no amendment should be allowed which is ex-facie barred by limitation. The issue has to be decided in the facts & circumstances of each case. At the time when the present suit was instituted, it was open for the Petitioners to claim partition and separate possession. However, the suit has been filed simplicitor for removal of encroachment. In my opinion, apart from limitation which comes in the way of proposed amendment, the proposed amendment would change the nature of the suit from one seeking removal of encroachment to another seeking partition and separate possession.

5. In view thereof, there is no reason to interfere in the order passed by the trial Court rejecting the application in exercise of the powers conferred under Article 227 of the Constitution of India.

6. The Petition is dismissed.

(SHARMILA U. DESHMUKH, J.)